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Reporting Foreign Accounts and Funds and Foreign Assets

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Reporting Foreign Accounts and Funds and Foreign Assets

-by Neil E. Harl*

Developments in recent years have focused a bright light on various assets owned abroad and the reporting requirements now in place.¹ What a few years ago involved requirements with little relevance for farm and ranch taxpayers have, partly because of rising farm and ranch incomes and asset values and partly because of increasing sophistication of taxpayers, become important for a not insignificant number of farm and ranch taxpayers and others.

The Bank Secrecy Act of 1970

Reporting requirements for foreign accounts and funds were implemented under the Bank Secrecy Act of 1970.² That legislation focused heavily on offshore bank accounts. After several years of modest attention to this area of tax enforcement, the Department of the Treasury pursued a two-pronged approach – (1) a voluntary disclosure program, available until October 25, 2009, which permitted taxpayers with unreported offshore accounts to avoid civil penalties, become compliant and sidestep criminal charges and (2) increased audit activity.

Reporting requirements. The reporting requirements specified that “U.S. Persons” generally were required to disclose any account in which they had a financial interest or as to which they had signature or other authority.³ The Report of Foreign Bank and Financial Accounts (FBAR) had to be filed by June 30 of the year following the year the \$10,000 threshold was met. That was the “FBAR” regime. It required the reporting of any interest in an account held at any point during the calendar year with an aggregate value exceeding \$10,000, even if no payment or benefit was received during the year by the U.S. person. Foreign financial accounts reportable included bank accounts, securities accounts and “other financial accounts.” The willful failure to file FBAR reports (Form TDF 90-22.1) has resulted in penalties.⁴ Hedge and private equity funds were not reportable.

The Treasury Department’s Financial Crimes Enforcement Network (FinCen) has provided a general exemption to mandatory e-filing of the FBAR until July 1, 2013. However, the temporary exemption does not relieve filers of the obligation to file an FBAR. Thus, calendar year 2011 FBARs are still due by June 30, 2012 and filing can be in paper or handled electronically.

Hardship exemption for small businesses. In support of small businesses, FinCen’s Office of Compliance provides procedures for filers to request a temporary limited hardship exemption from mandatory e-filing. A small business may request, and may be granted, an emergency extension based upon limited hardship exemptions.⁵

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Individual filers. FinCen expanded the option for individuals to file electronically, effective August, 2011, the Report of Foreign Bank and Financial Accounts (FBAR). Individuals from anywhere in the world can sign up to file their individual FBARs by accessing the FinCen E-Filing web site.⁶

Reporting of Cash payments Over \$10,000 (Form 8300). Although FinCen is making electronic filing of the Report of Cash Payments Over \$10,000 Received in a Trade or Business, Form 8300, available for electronic filing and will encourage the use of electronic filing, FinCen is not yet mandating the e-filing of the report.⁷

The 2010 HIRE Act

The Hiring Incentives to Restore Employment Act of 2010 (HIRE)⁸ by enacting the Foreign Account Tax Compliance Act of 2009 (commonly referred to as FATCA) extended the regulatory reach to foreign assets, such as foreign stocks and securities and interests in foreign entities, with a \$50,000 reporting threshold. Failure to file triggers a \$10,000 penalty with an additional penalty if it continues for more than 90 days. The requirement is imposed on both financial institutions and account holders with a “foreign financial agency.” For this purpose, the term “U.S. person” includes a citizen or resident of the United States and an entity created, organized or formed under U.S. law. As a general rule, an account is not considered foreign if it is maintained by a financial institution located in the United States.

The HIRE Act provision generally requires foreign financial institutions to provide information to the Internal Revenue Service regarding their United States accounts. The 2010 enactment also requires non-financial foreign entities to provide information on their substantial U.S. owners to withholding agents. The 2010 enactment imposes a withholding tax on certain payments to foreign financial institutions and non-financial foreign entities that fail to comply with their obligations.

This reporting is done with the income tax return.

Proposed regulations. The proposed regulations⁹ lay out a step-by-step process for U.S. account identification, information reporting and withholding requirements for foreign financial institutions, other foreign entities and U.S. withholding agents. The regulations implement FATCA’s obligations in stages to minimize burdens and costs consistent with achieving the statute’s compliance objectives. The rules and implementation schedule are also adjusted to allow time for resolving local law limitations to which some foreign financial institutions may be subject.

The proposed regulations phase in the reporting obligations as follows:

- For reporting in 2014 and 2015 (with respect to calendar years 2013 and 2014), participating foreign financial institutions are required to report only the name, address, taxpayer identification number (TIN) and account balance with respect to U.S. accounts.
- Beginning with reporting in 2016, with respect to calendar year 2015, in addition to the above information, income

associated with U.S. accounts must be reported.

- Beginning with reporting in 2017, with respect to calendar year 2016, full reporting, including information on the gross proceeds from broker transactions, is required.

The proposed regulations phase in the pass-through payment regime in two steps:

- Beginning on January 1, 2014, foreign financial institutions, like U.S. withholding agents, will be required to withhold on pass-through payments that are withholdable payments. Those institutions will also be required to report annually the aggregate amount of certain payments to each non-participating foreign financial institution for the 2015 and 2016 calendar years.
- Beginning no earlier than January 1, 2017, the scope of the pass-through payments is scheduled to be expanded beyond withholdable payments and foreign financial institutions will be required to withhold on such payments in accordance with future guidance. For jurisdictions that enter into agreements to facilitate FATCA implementation, the Department of the Treasury and IRS are to work with governments of those jurisdictions to develop practical alternative approaches to achieving the policy objectives of pass-through payment withholding.

ENDNOTES

¹ See the Bank Secrecy Act of 1970, Pub. L. No. 91-508, codified at 12 U.S.C. § 18296, 12 U.S.C. §§ 1951-1959, 31 U.S.C. §§ 5311-5330; the Foreign Account Tax Compliance Act of 2009 (FATCA), Pub. L. No. 111-147. See generally 1 Harl, *Farm Income Tax* § 1.09[3][i] (2012 ed.).

² Pub. L. No. 91-508, codified at 12 U.S.C. § 18296, 12 U.S.C. §§ 1951-1959; 31 U.S.C. §§ 5311-5330.

³ Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts.

⁴ See *United States v. Williams*, 2012-2 U.S. Tax Cas. (CCH) ¶ 50,475 (4th Cir. 2012), *rev’g*, 2010-2 U.S. Tax Cas. (CCH) ¶ 50,623 (E.D. Va. 2010), summarized below at page 125.

⁵ See <http://www.fincen.gov/whatsnew/html/20120221.html>.

⁶ See Final Notice, Agency Information Collection and Reporting Activities; Electronic Filing of Bank Secrecy ACT (BSA) Reports, 2012FED ¶46,301, February 27, 2012.

⁷ See 26 U.S.C. § 6011(e)(2).

⁸ Pub. L. No. 111-147, 124 Stat. 71 (2010).

⁹ REG NPRM 121647-10, 77 Fed. Reg. 9021 (Feb. 15, 2012).